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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

MAILED

Application Number: 10/648,618

SEP 04 2007

Filing Date: August 27, 2003

GROUP 1700

Appellant(s): LEHMBERG ET AL.

Edward Squillante
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 5/1/07 appealing from the Office action
mailed 10/30/06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct except for the rejection of claims 21 and 22 under 35 USC 112, second paragraph (see **(10) Response to Argument**).

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

EP 560609	Trumbetas et al	9-1993
DE 19919711	Daniel	1-2000
EP 0011324	Pflaumer et al	5-1980
EP 0001460	Pultinas	4-1979
US 5932260	Soughan	8-1999
US 4076847	Johnson et al	2-1978
US 4496596	Stoeckli et al	1-1985

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-3, 10-12, 21, and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by EP 560609 (see Abstract).

EP 560609 discloses a product comprising coffee with an aroma or essence component (e.g. coffee oil), said product being a precursor to a preparation of a beverage. EP 560609 further discloses the use of approximately 1 gm of soluble coffee

powder carrying, for example, 1.5% aroma additive (the coffee oil dispersion) in 99 gms of water (e.g. about 3.5 ounces; Example 1). This means that 2 grams of soluble coffee containing said aroma additive is required in 7 ounces of water, said 2 grams being considered within the dose that may be used conventionally as called for in the instant claims (e.g. 1.4-2.4 g coffee particulates per 6-8 ounces of water). Of course, the 2 grams material used in solution is made up of 1.5% aroma compound, thus a reduction in the level of the soluble coffee that may be used by 1.5% which is approximately 1.97 grams of soluble coffee.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

4. Claims 1-18, 21, and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over DE 19919711.

DE 19919711 discloses a product comprising tea or coffee with an aroma or essence component (e.g. tea or coffee) in a bag, said product being a precursor to a preparation of a beverage (see Abstract).

DE 19919711 does not disclose the particular amounts of infusible or water soluble material as called for in the instant claims. However, it would have been obvious to one having ordinary skill in the art at the time of the invention to have arrived

at same depending on the strength of aroma desired in the precursor and, therefore, subsequent beverage.

DE 19919711 is silent regarding the use of tea leaf that has been decaffeinated. However, decaffeinated tea leaf is notoriously well known, and it would have been further obvious to have incorporated same as a matter of preference depending on the particular known health benefit derived from same.

It should be noted that when referring to the additive as an aroma that it is expected that DE 19919711 is referring to a natural aroma compound. However, if it is shown that DE 19919711 does not specify that the aroma compound is a natural aroma compound, it would have been further obvious to have employed same as a matter of preference depending on availability or cost since natural and artificial aroma compounds are notoriously well known in the prior art.

Although DE 19919711 does not appear to specifically recite the preparation of the follow-up beverage composition from the precursor, it is inherent that same is the intent and natural consequence for a packaged dry coffee or tea product (see Abstract). Nevertheless, if it is shown that DE 19919711 does not inherently provide for the precursor being prepared into a beverage, it should be noted that the combination of a beverage precursor (e.g. ground or instant coffee) with water to attain a beverage product is notoriously well known, and it would have been further obvious to have said beverage as a natural, expected result for a beverage precursor.

5. Claims 1-3, 10-12, 21, and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over EP 560609 (Abstract), Stoecklie et al (Abstract; col. 1), EP 011324 (Abstract; claims), EP 001460 (Abstract), or Soughan (Abstract; claims).

Each reference discloses a mixture of coffee and aroma additive wherein said additive is either carried by coating/absorbed in some manner on the coffee itself and/or via the composition being held in a package.

Stoecklie et al, EP 001460, EP 011324, and Soughan do not disclose the particular amounts of infusible or water soluble material as called for in the instant claims. Also, if it is shown that EP 560609 does not disclose the particular amounts as called for in the instant claims, the following should be noted. In any one of EP 560609, Stoecklie et al, EP 011324, EP 001460, or Soughan, it would have been obvious to one having ordinary skill in the art at the time of the invention to have arrived at same depending on the strength of aroma desired in the precursor and, therefore, subsequent beverage.

6. Claims 1-18, 21, and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson et al.

Johnson et al discloses a product comprising tea with an aroma or essence component (e.g. tea) in a bag, said product being a precursor to a preparation of a beverage. Johnson et al further discloses said coffee solid carrying the aroma additive as same is coated on the solid. It should be noted that when referring to the additive as an aroma that Johnson et al is referring to a natural aroma compound or synthetic compound (e.g. Abstract; col. 1, lines 59-68).

Johnson et al does not disclose the particular amounts of infusible or water soluble material as called for in the instant claims, it would have been obvious to one having ordinary skill in the art at the time of the invention to have arrived at same depending on the strength of aroma desired in the precursor and, therefore, subsequent beverage.

Johnson et al is silent regarding the use of tea leaf that has been decaffeinated. However, decaffeinated tea leaf is notoriously well known, and it would have been further obvious to have incorporated same as a matter of preference depending on the particular known health benefit derived from same.

(10) Response to Argument

Applicant's arguments regarding the rejection of claims 21 and 22 under 35 USC 112 are considered to be persuasive, and this rejection has been withdrawn. In particular, Applicant's reference to the original Specification for the meaning of "aroma compound additive is carried" fairly demonstrates support that the aroma compound is carried by carrier compounds as discussed in the original Specification.

Applicant argues there is no teaching in EP560609 of using less than conventional amounts of infusible or water soluble materials in combination with aroma compound additive as claimed in the present invention. However, as discussed above, EP 560609 discloses a precursor product containing water soluble coffee which carries an aroma compound additive therein in an amount as called for in the instant claims:

EP 560609 further discloses the use of approximately 1 gm of soluble coffee powder carrying, for example, 1.5% aroma additive (the coffee oil dispersion) in 99 gms of water (e.g. about 3.5 ounces; Example 1). This means that 2 grams of soluble coffee containing said aroma additive is required in 7 ounces of water, said 2 grams being

considered within the dose that may be used conventionally as called for in the instant claims (e.g. 1.4-2.4 g coffee particulates per 6-8 ounces of water). Of course, the 2 grams material used in solution is made up of 1.5% aroma compound, thus a reduction in the level of the soluble coffee that may be used by 1.5% which is approximately 1.97 grams of soluble coffee.

Applicant further argues that EP 560609, as well as each of the other applied references, does not provide the aroma compound and infusible or water soluble materials in such manner as to provide "a superior precursor or beverage" (e.g. page 9), "better tasting beverage" (e.g. page 11) or "a composition preferred by consumers" (e.g. page 14). First, it should be noted that it has not been persuasively shown that the instant invention provides any sort of unexpected results regarding the precursor or end product which can be directly tied to the ingredients and amounts of same as set forth in the instant claims. In fact, the only evidence that might be relied upon is the sole Example bridging pages 9 and 10 of the original specification. However, the Example only relates to tea leaf precursor and tea beverage; note that the instant claims also recite alternative infusible materials such as coffee and cocoa. In addition, the tea leaf in the Example is decaffeinated, a limitation found only in instant claims 5, 6, 14 and 15. If one were to rely on the Example as a showing, same is not commensurate with the invention as recited in regard to not only all of the alternative soluble materials but a showing of the endpoints of the range of aroma compound used. Moreover, from this single Example alleging an unexpected preference, it is not clear what in the composition actually provided the panelist's preference for the tea beverage prepared by the instant invention. In particular, the tea beverage made using the added tea aroma also comprises *maltodextrin*. It is quite likely that the maltodextrin imparted

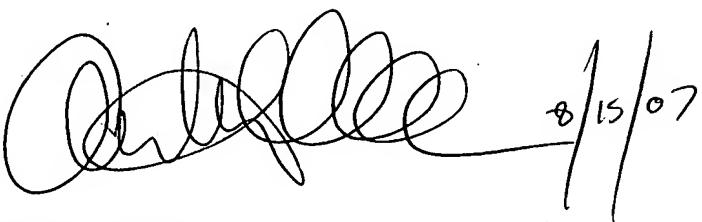
some mild sweetening not present in the conventional beverage. Such would not be unexpected as maltodextrin is notoriously well known as a flavor enhancing ingredient as well as a mild sweetener. There is no further information regarding the 50 panelists nor any indication that such preference tied only to the taste of same. Were the panelists swayed by a promotional sale or differing advertising with respect to the packaging used? Was it a blind taste panel? There is no indication as to how the beverages were rated or how close the preference was between sampled beverages. There is simply no convincing evidence that the instant claims provide a precursor or beverage that is unexpected. Moreover, even if such evidence did exist, it could not be used to overcome the rejection of claims under 35 USC 102 as set forth above with regard to EP 560609. Contrary to Applicant's assertions that the invention as claimed is superior or better tasting, it is expected that the flavor attributed to a reduction in water soluble material may be met by adding an aroma additive to such degree as to make up for any loss in flavor. All of the applied prior art references employ the concept of adding an aroma compound in conjunction with a soluble beverage substrate. With regard to those prior art references applied under 35 USC 103, the particular amount of aroma agent to be added to a soluble or infusible tea or coffee is seen as nothing more than a matter of preference depending on the particular flavor desired and degree of flavoring. Knowing that an additive will cause a certain result (aroma flavoring provides flavoring), one would specifically measure the result and control the amount of additive added thereto in relation to the amount of result desired. *In re Skoner*, 186 USPQ 80.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Anthony Weier

Conferees:

Keith Hendricks 

Gregory Mills 